ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF MAINE.[2]

SUPREME COURT OF MISSOURI.[3]

SUPREME COURT OF NEW YORK.[4]

ACTION.

Separate Actions on same Claim.—In order to avoid multiplicity the law forbids that a cause of action shall be split up for the purpose of bringing several actions. But where several claims, payable at different times, arise out of the same contract or transaction, separate actions can be brought as each liability enures: *The Reformed Prot. Dutch Church* v. *Brown*, 54 Barb.

Yet if no action is brought until more than one claim is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in the one first brought will be an effectual bar to a second action, brought to recover the other claims that were due when the first was brought: *Id.*

Objections to be raised at trial.—An objection to the right of the plaintiff to maintain an action, must be raised on the trial, if it be capable of being obviated; as where it is possible that new or additional evidence could be supplied, if a defect in the proof were pointed out: *Brookman et al.* v. *Hamill et al.*, 54 Barb.

But, as an objection to the unconstitutionality of an act of the legislature cannot be obviated by any action of the plaintiff, the defendant is not bound to raise the objection, on the trial, that the statute under which the plaintiff sues is unconstitutional: *Id.*

ADMIRALTY.

Jurisdiction—Dist. Courts of U. S.—When the proceeding is against a vessel by name, whatever may be the nature of the claim, it is a proceeding in the nature and with all the incidents of a suit in admiralty; and all such proceedings are, exclusively, within the jurisdiction of the District Courts of the United States: *Ferran* v. *Lowndes*, 54 Barb.

Hence, a statute passed by a state legislature, conferring the right to a lien on a vessel, and to proceed against her by name, whatever may be the nature of the claim, is unconstitutional and void: *Id.*

To determine whether the debt is within the sphere of maritime jurisdiction, it is not necessary to ascertain for what purpose, or for

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[2] From W. W. Virgin, Esq., Reporter; to appear in 56 Me. Rep.

[3] From T. A. Post, Esq., Reporter; to appear in 44 Mo. Rep.

[4] From Hon. O. L. Barbour; to appear in vol. 54 of his Rep.

whose use it was contracted. If the proceeding is *in rem*, and against the vessel by name, this is conclusive, and *per se* shows that it is one of maritime jurisdiction, and exclusively within the jurisdiction of the District Courts of the United States: *Id.*

Arbitrament and Award.

Objections to Award.—The burden is upon the party objecting to a report of referees to establish the facts upon which he relies: *Rawson* v. *Hall*, 56 Me.

Where a real action brought by the assignee of a mortgage against the mortgagor and his tenant at will, was referred, together with all matters in dispute between the parties, and the referees reported that, in fixing upon the amount to be paid by the mortgagor to enable him to redeem, they took "into consideration the mutual notes and accounts, and claims of said assignee and mortgagor against each other;"—*Held*, that it did not appear, from the report, that the sum thus fixed upon was thereby increased rather than diminished; and, therefore, that the report would not be set aside for that reason: *Id.*

Assignment. See *Debtor and Creditor.*

Bankers.

Right of Retainer.—Where one banker receives from another a promissory note, made by third persons, for collection merely, with instructions to remit the proceeds, when paid, in a draft, which note is subsequently paid by the makers, the receiver giving credit therefor to the person from whom he receives it, without any knowledge or notice that any other person than the one transmitting it to him had any interest therein, he has a right to retain the proceeds, as against the true owner, on account of a balance due to him from the transmitter: *Dickerson* v. *Wason*, 54 Barb.

Bill of Lading.

Erroneous Acknowledgment in—Parol Evidence to Explain.—A bill of lading given by a person who was agent for several vessels, all alike engaged in transporting goods brought to certain waters by a railway line, but having separate owners, and not connected by any joint undertaking to be responsible for one another's breaches of contract—the bill, through mistake of the agent, acknowledging that certain goods had been shipped on the vessel *A.*, when, in fact, they had been previously shipped on vessel *B.*, and a bill of lading given accordingly—will not make the vessel A. responsible, the goods having been lost by the vessel B., and the suit being one by shippers of the merchandise against the owner of the vessel A., and the case being thus unembarrassed by any question of a *bona fide* purchase on the strength of the bill of lading: *The Lady Franklin*, 8 Wall.

While a bill of lading, in so far as it is a contract, cannot be explained by parol, yet being a receipt as well as a contract, it may in that regard be so explained, especially when used as the foundation of a suit between the original parties to it: *Id.*

COMPROMISE.

Favored by Courts unless there is bad faith.—Where a controversy has been adjusted by the parties to it, by an offset, mutually agreed upon, of the claims which each sets up against the other, and there is a reciprocal agreement not to sue on either side, courts should give effect to the agreement, unless the case shows bad faith in the assertion of any claim at all on the part of one of the parties, or that the claim is so destitute of foundation as to savor of imposition and extortion: *Doyle* v. *Donnelly*, 56 Me.

CONTRACT.

Implied Covenant.—In the case of a contract drawn technically in form, and with obvious attention to details, a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the non-implication of it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating: *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall.

Ratification of Agreement made without authority—Evidence—Practice.—If, with a full knowledge of the facts concerning it, a person ratify an agreement which another person has improperly made, concerning the property of the person ratifying, he thereby makes himself a party to it, as much so as if the original agreement had been made with him. No new consideration is required to support the ratification: *Gregg* v. *Drakely*, 8 Wall.

When evidence *tends* to prove a contract of a certain character, asserted by a party before a jury, a court should either submit the evidence on the point to the consideration of the jury, or if, in the opinion of the court, there are no material extraneous facts bearing on the question, and the contract relied on must be determined by a commercial correspondence alone, then interpret this correspondence, and inform the jury whether or not it proves the contract to be of the character contended for by the party: *Id.*

Accordingly, this court reversed a judgment, and ordered a *venire de novo* in a case where, in its opinion, the evidence below *tended* to prove a ratification and adoption by one person of a contract made by another, which ratification and adoption the defendant maintained that the evidence did prove, or, at least, tend to prove. This court, however, in the reversal, carefully avoided the expression of any opinion as to whether the evidence, which it said *tended* to prove such ratification and adoption, did or did not actually prove it: *Id.*

CORPORATION. See *Office and Officer.*

CRIMINAL LAW.

Counterfeiting U. S. Treasury Notes.—The passing, with intent to defraud, of a United States treasury note is an offence as well against the state as the United States; and although Congress

might, perhaps, by appropriate legislation, render the jurisdiction of the national courts exclusive, still, as it does not appear to have done so, the jurisdiction of the state courts is not suspended. An incictment for such offense is not to be held bad, and the judgment upon it void, for the reason that an indictment would lie, under the laws of the United States, before the national courts, for the same acts as an offense against the United States: *In re Truman*, 44 Mo.

The legislature intended, by sections 16 and 21, ch. 202, Gen. Stat. 1865, to make the counterfeiting or passing of counterfeit money obligations, of every class and description, forgery in some of its statutory degrees; and an indictment for passing, with intent to defraud, a United States treasury note, as being an instrument or writing purporting to create a moneyed obligation, may be framed upon section 21 of the statute, setting out therein an offence within the jurisdiction of the state court: *Id.*

DEBTOR AND CREDITOR. See *Joint Debtors—Limitations.*

Fraudulent Conveyances—Secret Trusts.—The law will not permit a man to withdraw his property from his creditors. Nor can a man owing debts be permitted to devote his capital, industry, or credit to the accumulation of property to be held by some third person, for his own use or that of his family, to the exclusion of his creditors. In all such cases the law intervenes and goes behind the fraudulent and secret transactions, and subjects the property or trust funds to the payment of just and legal demands: *Waddingham's Executors* v. *Loker*, 44 Mo.

In a suit to subject certain stocks held by the widow and children of A. to the payment of his obligations, the mere fact that at his solicitation B. had purchased and held the same for the benefit of A.'s family, and that, as agent for B., A. had examined the books of the company and looked after the general management of the stocks, and, in his capacity as agent, had deposited dividends arising from the stocks, will not make such stocks liable for his debts, if it further appears that the stocks were not procured with his money or credit, and that he had no ownership or control of it except as agent of B.: *Id.*

In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud: *Id.*

Bill of Exchange—Equity—Assignment of Debt.—A bill of exchange drawn by a creditor upon his debtor does not of itself operate as an assignment in equity of the debt, even where negotiated for a good consideration—although it is evidence tending to show such assignment, and, with other circumstances to show that such was the intention of the drawers, will vest in the holder an exclusive claim to the indebtedness: *Bank of Commerce* v. *Bogy*, 44 Mo.

Anything that shows an intention on the one side to make a

present irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment, if supported by a sufficient consideration; and when the money is in the hands of the drawee, and the order is given for the exact amount, and a full consideration has been received for it—especially if advanced at the time, with no circumstances indicating any remaining interest in the drawer—the order should be treated as evidence of an equitable assignment: *Id.*

ERROR.

Striking out good Defence.—It is error, entitling the aggrieved party to a reversal, for a court, on motion of a plaintiff, to strike out of an answer that which constitutes a good defence, and on which the defendant may chiefly rely: *Mandelbaum* v. *The People*, 8 Wall.

FRAUD. See *Debtor and Creditor.*

Misrepresentation.—The defendant loaned a sum of money and received for security thereof a warranty deed of land from the borrower, who being called upon for repayment, negotiated a loan of the plaintiff, and agreed to give him the same security. All the parties met, and thereupon the plaintiff furnished the money with which to pay the defendant, and presented him with, and requested him to sign a deed of warranty from the defendant to the plaintiff, and thus save the expense of two deeds, assuring him that that was "the correct way to do business," and that the bond for reconveyance, executed by the plaintiff to the borrower, "would clear the defendant from anything." In an action of covenant broken, *Held*, that the defendant's deed was not obtained by fraudulent representation: *Grant* v. *Grant*, 56 Me.

A person holding a warranty deed of land as security for a loan, is not chargeable with fraud if, in order to obtain payment, he, at the request of the other parties, gives a warranty deed of the same land to a third person who furnishes money to pay the original loan, although the title proves not to be good, if it does not appear that he knew of the defect: *Id.*

FRAUDS, STATUTE OF. See *Insurance.*

Promise to Marry within four years.—Where the defendant told the plaintiff he was not able to marry her then, but promised her he would marry her within four years; it not appearing that the parties understood that the promise was not to be performed within one year, such promise is not within the statute of frauds: *Lawrence* v. *Cooke*. 56 Me.

GOVERNMENT. See *United States.*

HIGHWAY.

Dedication by Use.—The continuous and uninterrupted use of land as a highway, during the period limited in sec. 85, ch. 19 R. S. 1858 (sec. 80, ch. 16 R. S. 1849), creates a prescriptive right in favor of the public: *Hanson et al.* v. *Taylor*, 23 or 24 Wis.

Such use for the ordinary purposes of travel must be presumed (in the absence of proof to the contrary) to have been under claim of right; and *it seems* that it is not necessary to show that the road was worked, or attached to a road district, or that any other act was done by the town authorities recognizing it as a highway: *State* v. *Joyce*, 19 Wis., 90, overruled. *Id.*

Husband and Wife.

Deed of Trust of Wife's Separate Property to secure Debts of the Husband—Liability of surplus in the hands of the Trustee after sale for Debts of the Husband.—Where a married woman, jointly with her husband, conveys her separate real estate by deed of trust to secure a certain debt of her husband, and the deed provided that if the property should be sold under the deed the proceeds should be applied to the payment of the debt, and the remainder, if any, should be paid to the parties of the first part—the husband and wife—or their legal representative:—*Held*, that this remainder should be returned to the party of whose property it was the proceeds, and that by the provision of the deed it belongs to the wife alone: *Kinner* v. *Walsh*, 44 Mo.

Insurance.

Need not be in Writing—Statute of Frauds.—A contract of insurance against fire is not required by the common law, nor by R. S., c. 49, § 12, to be in writing: *Walker* v. *Metropolitan Ins. Co.*, 56 Me.

A contract of insurance for one year is not within the statute of frauds: *Id.*

Joint Debtors.

Debt due to one of two Defendants sued on Joint Contract—Sureties.—It has been long settled in this state that where suit is brought against several defendants on a contract executed by them jointly, a debt due from plaintiff to one of the defendants, can be offset to the claim sued on. By the statutes of Missouri, contracts which by the common law are joint only are construed to be joint and several; and, by the practice act, judgment may be given for or against one of the parties, plaintiffs or defendants. These provisions so change the relations of parties that the authorities which forbid an offset of a debt due one of several defendants can have no force here; and even if this right of offset were not in general conceded, it certainly must be when the defendant who seeks to make it is the principal and his co-defendant is his security: *Mortland* v. *Holton*, 44 Mo.

Limitations, Statute of. See *Trust.*

Bills and Notes—Indorsements of Credit.—The time when the indorsement of a credit on a note was made is a fact to be settled by the jury, and to this end the writing must be laid before them.

If there is no evidence to the contrary, the presumption is that the indorsement was made at the time it purports to bear date, and the burden of proving the date to be false lies with the other party. But if the date does not purport to be made cotemporaneously with the receipt of the money, it is inadmissible as a part of the *res gestæ*: *Carter* v. *Carter*, 44 Mo.

In an action by an administrator upon a note made to his intestate more than ten years before, the indorsement of a credit thereon by the intestate, nearly two years before the note expired by limitation, would be *prima facie* evidence that he had received part payment on the note. Such indorsement was clearly admissible, because against the interest of the deceased: *Id.*

Lis Pendens.

Cotemporary Suits in Different Courts.—A. sued B., with other defendants, for partition of certain lands. Afterward, before the first suit was determined, B. brought suit in another court against the other defendants for the partition of the same lands, without joining A. in the suits; and a judgment was had in this second suit, a sale made, and a sheriff's deed of the land executed. In a subsequent trial, in a different action, an attempt was made to impeach the judgment in the second suit, and the sheriff's deed, on account of the pendency of the previous action:—*Held*, that in the third action the proceedings in the second suit could not be treated as void because of the pendency of the first. It was the duty of the defendants in such second suit, when properly served, if they objected to answering in that court, to have pleaded in abatement the proceeding pending in the other court. This is the universal practice. There may be circumstances which would authorize the double proceeding, and the matter should be brought to the attention of the court by plea, that it may pass upon the preliminary question before proceeding to final judgment: *Bernecker* v. *Miller*, 44 Mo.

New Trial. See *Verdict.*

Office and Officer.

Quo Warranto—Information in nature of a Civil Proceeding—Burden of Proof in proceeding under.—An information in the nature of a writ of *quo warranto* is essentially a civil proceeding; and where such an information was brought to try the right of respondent to the office of secretary of a certain insurance company, *Held*, that the burden of proof was upon the relator, and that every reasonable intendment was to be made in favor of the regularity of the proceedings by which respondent was put in office. They were the acts of a private corporation, and are to be presumed regular until the contrary appears: *State ex rel. Bornefeld* v. *Kupferle*, 44 Mo.

Officers of a corporation, in possession of their respective offices, are presumed to be regularly elected and entitled to hold until the contrary be shown: *Id.*

Under the twenty-second by-law of that institution, a majority of the *de facto* board of directors of the "German Insurance Company," of St. Louis, had a right to remove the secretary for sufficient cause, without formal notice of charges or trial; and until their action is impeached it is to be presumed that they acted on sufficient grounds: *Id.*

Legislative office in the United States—Incumbent has no vested right in.—In the United States, offices created by the legislature are not held by grant or contract; nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact: *State ex rel. Attorney-General* v. *Davis*, 44 Mo.

PARTNERSHIP.

Remedies of Partners against each other.—One partner cannot arrest his co-partners. The very nature of a partnership forbids this: *Smith et al.* v. *Small et al.*, 54 Barb.

Each partner is a joint owner, as well of capital as of property purchased with it. If the capital be misappropriated by a partner, no remedy is furnished by action unless a balance be struck and a promise made to pay the same: *Id.*

Where, under an agreement for a joint contribution of capital by the parties and a joint ownership of the property, some of the partners receive from the others a sum of money to be applied to the purchase of the article in which the parties are to deal, and for the buying and selling of which the partnership was formed, which they fail so to apply, an order of arrest cannot be granted: *Id.*

Where, by an agreement, there is to be a joint contribution of capital by the parties, and there is a joint ownership of the property and an agreement to share profit and loss, the parties are partners: *Id.*

QUO WARRANTO. See *Office and Officer.*

RECORD.

What is evidence as a record.—A certificate under the hand of the clerk and the seal of this court, stating substantially that, at a term named, "a divorce from the bonds of matrimony was duly decreed between" certain persons named, "as will more fully appear by the record," &c., is not admissible evidence of any fact therein stated: *Jay* v. *East Livermore*, 56 Me.

Neither is a paper signed and sealed in like manner, and certified to be a "true extract from the record:" *Id.*

In an action between towns for the recovery of the value of certain pauper supplies, wherein an alleged divorce of one of the paupers from his former wife becomes a material question at issue, the judgment of divorce rendered by this court twelve years previously, but shown not to have been extended upon the records, may be proved by a certified copy of the docket entry of the libel and the clerk's memoranda of the action of the court thereon: *Id.*

SET OFF. See *Joint Debtors.*

STATUTES.

Construction of by Executive Departments.—Constructions of statutes, in relation to the accounts of individuals with the United States, made by the accounting officers of the Treasury, especially when so long continued as to become a rule of departmental practice, are entitled to great consideration, and will in general be adopted by this court: *United States* v. *Gilmore*, 8 Wall.

But when, after such a construction of a particular class of statutes has been long continued, its application to a recent statute of the same class is prohibited by Congress, and following the spirit of that prohibition, the accounting officers refuse to apply the disapproved construction to a still later statute of the same class, this court will not enforce its application: *Id.*

The Act of June 20th, 1864, increasing the pay of private soldiers in the army, cannot be construed as having the effect of increasing the allowance to officers for servants pay: *Id.*

SUPREME COURT OF UNITED STATES.

Jurisdiction in Cases from State Courts.—It is necessary to the jurisdiction of this court, under the 25th section of the Judiciary Act, that the *record* show, either by express words or necessary legal intendment, that one of the questions mentioned in that act was before the state court, and was *decided* by it: *Gibson* v. *Chouteau*, 8 Wall.

Neither the argument of counsel nor the opinion of the court below can be looked to for this purpose: *Id.*

Where there are other questions in the record, on which the judgment of the state court might have rested, independently of the Federal question, this court cannot reverse the judgment: *Id.*

TORT.

Waiver of.—Where one has unlawfully taken possession of another's property, the tort may be waived and an action brought for its value. Such a cause of action is assignable: *Hawk et al.* v. *Thorn*, 54 Barb.

TRUST.

Purchase of land on joint account—Statute of Limitations.—In May, 1835, an agreement was entered into between Price and Seymour, which provided, on the part of Price, that he should devote his time and best judgment to the selection and purchase of land, to an amount not exceeding five thousand dollars, in certain designated states and territories, or in such of them as he might find most advantageous to the interest of Seymour; that the purchases should be made during the then existing year, and that the contracts of purchase should be made, and the conveyances taken in the name of Seymour; and on the part of Seymour, that he should furnish the five thousand dollars; that the lands purchased should be sold within five years afterwards, and that of the profits made by such purchase and sale, one-half should be paid to Price, and be

in full for his services and expenses. Under this agreement lands having been purchased by Price and the title taken in the name of Seymour, *Held*, That Seymour took the legal title in trust for the purposes specified; that is, to sell the property within the time limited, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one-half of the residue; and that, to this extent, Seymour was a trustee, and Price the *cestui que trust: Seymour* v. *Freer*, 8 Wall.

That the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim; the burden of proof as to such relinquishment resting with the heirs of Seymour: *Id.*

That the principle of equitable conversion being applied to the case, and the land which was to be converted into money being regarded and treated in equity as money, the personal representative of Price was the proper person to maintain this suit, and it was not necssary that his heirs-at-law should be parties: *Id.*

The statute of limitations has no application to an express trust where there is no disclaimer: *Id.*

UNITED STATES.

Liability on its Contracts.—In theCourt of Claims the government is liable for refusing to receive and pay for what it has agreed to purchase: *Gibbons* v. *United States*, 8 Wall.

When an individual who has been absolved from such a contract, by the refusal of the proper officer to receive the articles when tendered, afterwards consents to deliver them under a threat of the officer that he will withhold money justly due to the plaintiff, he can only recover the contract price, whatever may have been the current market value of the articles: *Id.*

The government is not liable on an implied assumpsit, for the torts of its officer, committed while in its service, and apparently for its benefit: *Id.*

To admit such liability, would involve the government in all its operations, in embarrassments, losses and difficulties, subversive of of the public interest: *Id.*

When the injury to individuals, in such cases, merits redress by the government, the remedy is with Congress. The statute does not confer jurisdiction on the Court of Claims: *Id.*

UNITED STATES COURTS. See *Supreme Court.*

Jurisdiction.—An appeal which had been allowed from a District Court having Circuit Court powers dismissed; it having been allowed just after an act had passed, which created a Circuit Court for the same district, and which repealed so much of any act as gave to the District Court Circuit Court powers: *The Lucy*, 8 Wall.

Appellate jurisdiction in the Federal courts depends on the Constitution and the Acts of Congress. When these do not confer it,

courts of the United States cannot exercise it by virtue of agreements of counsel or otherwise: *Id.*

The fact that no transcript of the record was filed at the next term to that when a decree appealed from was made, is, in general, fatal to the appeal: *Id.*

Act of 1848 *as to Territorial Courts—Citizenship of Parties.* The Act of February 22d, 1848, which enacts that the provisions of the Act of February 22d, 1847, transferring to the District Courts of the United States, cases of Federal character and jurisdiction begun in the territorial courts of certain territories of the United States, and then admitted to the Union (none of which, on their admission as states, however, as it happened, were attached to any judicial circuits of the United States), shall apply to all cases which may be pending in the Supreme or other Superior Courts of *any* territory of the United States which may be admitted as a state at the time of its admission, is to be construed so as to transfer the cases into District Courts of the United States, if, on admission, the state did not form part of a judicial circuit, but if attached to such a circuit, then into the Circuit Court: *Kountze Brothers* v. *Express Company*, 8 Wall.

An averment in the declaration, that the plaintiffs were a firm of natural persons, associated for the purpose of carrying on the banking business in Omaha, Nebraska Territory (a place which, at the time of the suit brought, was remote from the great centres of trade and commerce), and had been for a period of eighteen months engaged in that business, at that place, is equivalent to saying that they had their domicile there, and is a sufficient averment of citizenship: *Id.*

An averment that the defendant is a foreign corporation, formed under and created by the laws of the State of New York, is a sufficient averment that the defendant is a citizen of New York: *Id.*

VERDICT.

New trial—Right to grant.—Courts of general common-law jurisdiction in England and the United States seem to have universally exercised the power of setting aside the verdict of juries found in their own courts, and granting new trials; and the statutory provision (Gen. Stat. 1865, ch. 169, § 25) authorizing new trials in certain cases is rather a limitation upon, than a grant of power to, the Circuit Court. But courts of inferior and limited jurisdiction have never been in the habit of exercising this power, and it can not be assumed that such power exists in the probate courts in the absence of authority given by the statute or long usage: *Bartling* v. *Jamison*, 44 Mo.

In general, all courts of record, whether of special and inferior or of general jurisdiction, can modify or set aside entries of their own action made during the term, but that does not involve the right to refuse to enter or set aside a lawful verdict: *Id.*